European Labour Law

Roger Blanpain

Eleventh revised edition



KLUWER LAW INTERNATIONAL

European Labour Law

Roger Blanpain

Eleventh revised edition

This book was originally published as a monograph in the International Encyclopaedia of Laws/Labour Law and Industrial Relations



Published by:
Kluwer Law International
P.O. Box 316,
2400 AH Alphen aan den Rijn, The Netherlands
E-mail: sales@kluwerlaw.com
Website: http://www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.,
7201 McKinney Circle,
Frederick, MD 21704
USA
E-mail: customer.care@aspenpubl.com

Sold and distributed in all other countries by: Turpin Distribution Services Ltd., Stratton Business Park, Pegasus Drive, Biggleswade, Bedfordshire SG18 8TQ United Kingdom E-mail: kluwerlaw@turpin-distribution.com

DISCLAIMER: The material in this volume is in the nature of general comment only. It is not offered as advice on any particular matter and should not be taken as such. The editor and the contributing authors expressly disclaim all liability to any person with regard to anything done or omitted to be done, and with respect to the consequences of anything done or omitted to be done wholly or partly in reliance upon the whole or any part of the contents of this volume. No reader should act or refrain from acting on the basis of any matter contained in this volume without first obtaining professional advice regarding the particular facts and circumstances at issue. Any and all opinions expressed herein are those of the particular author and are not necessarily those of the editor or publisher of this volume.

Printed on acid-free paper.

ISBN 978-90-411-2767-9

© 2008, Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the prior written permission of the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, United States of America. E-mail: permissions@kluwerlaw.com.

The Author	3
List of Abbreviations	27
Prologue	29
General Introduction	61
Chapter 1. The Institutional Framework	61
§1. The Treaties	61
I. From a Community to a Union	61
II. The European Community	63
A. Objectives	63
B. Subsidiarity	64
III. Integration	69
§2. The Institutions and their Competences	70
I. The European Parliament	70
II. The Council	72
III. The Commission	74
IV. The Court of Justice	76
§3. Other Organs	85
I. The Economic and Social Committee	85
II. The European Social Fund	85
III. European Centre for the Development of Vocational	90
Training	89
IV. European Foundation for the Improvement of Living and	90
Working Conditions	90
V. The Standing Committee on Employment	90
VI. The Employment Committee	91
VII. The European Agency for Safety and Health at Work	94
VIII. The Committee of the Regions	94
IX. Other Advisory CommitteesX. Sectoral Joint Committees, Informal Groups and Sectoral	94
Dialogue Committees	94
XI. The Social Protection Committee	98

	XII. The European Globalisation Adjustment Fund	99
	XIII. The European Institute for Gender Equality	100
	XIV. The European Union Agency for Fundamental Rights	102
§4.	THE LEGISLATIVE PROCESS	104
	I. Community Law	104
	II. Secondary Law	105
	A. Regulations	105
	B. Directives	106
	C. Decisions	107
	D. Recommendations and Opinions	107
	E. International Agreements	108
§5.	THE DECISION-MAKING PROCESS	108
§6.	RELATIONS WITH OTHER INTERNATIONAL ORGANISATIONS	110
	I. General	110
	II. The International Labour Organisation	111
	III. The European Economic Area	121
Ch	apter 2. The Social Partners	124
81.	The Employers' Organisations	124
0	I. BUSINESSEUROPE	124
	II. CEEP	126
	III. UEAPME	127
	IV. Employers' Analysis of the Key Challenges Facing Europe's Labour Markets: BUSINESSEUROPE, CEEP, UEAPME	
	(2006)	129
§2.	The Trade Unions	136
Ch	apter 3. Competences of the EU Regarding Labour Law	147
§1.	Introductory Remarks	147
§2.	THE EC	147
	I. The Hierarchy of the Objectives: Non-Inflationary Growth	147
	II. Social Objectives	148
	III. Fundamental Rights and Competences	149
	A. Fundamental Rights	149
	1. Mega-Principles	149
	2. The European Convention for the Protection of Human	
	Rights and Fundamental Freedoms	149
	3. Fundamental Social Rights	150
	4. Discrimination	150
	B. Competences	151
	1. The EC	151
	a. Cooperation between Member States	151
	b. Legislative Competence	153
	(1) Social Matters	153
	(a) Qualified Majority Voting	154

(aa) Procedure	154
(bb) Areas	154
(b) Unanimous Voting	157
(aa) Procedure	157
(bb) Areas	157
(c) Excluded Areas	159
(aa) Pay	159
(bb) Right of Association	159
(cc) Right to Strike or to Impose Lock-outs	160
(2) Approximation of Laws	160
c. Employment Policy	161
(1) A Coordinated Strategy for Employment	161
(2) The European Social Fund	163
d. Equal Pay, Opportunity and Treatment	163
e. Vocational Training	163
f. Paid Holiday Schemes	164
g. Economic and Social Cohesion	164
h. Reporting	165
IV. The Role of the Commission	165
V. Involvement of the Social Partners	165
A. Consultation at Community Level	166
1. Procedure	166
2. Typology of the Results of the European Social	
Dialogue	170
a. Agreements Implemented in Accordance with	
Article 139(2): Minimum Standards	170
b. Process-oriented Texts	172
c. Joint Opinions and Tools: Exchange of Information	176
d. Procedural Texts	177
e. Drafting Checklist for New Generation Social	
Partner Texts	178
f. Sectoral Social Dialogue, 2006	178
3. Social Partners	180
B. Implementation of Directives	186
C. Social Dialogue (Articles 138–139)	188
D. Community-wide Agreements (Article 139)	188
1. The Agreement of 31 October 1991	188
2. The Maastricht Deal	191
a. Implementation in Accordance with National	
Practice	191
b. Implementation by a Council Decision	192
3. The Communication of the Commission (1993)	192
a. Concluding an Agreement	192
b. The Implementation of the Agreements	193
c. The Council	194
4. The Collective Agreement on Parental Leave of	
14 December 1995	195

5. The Agreement on Part-time Work of 6 June 19976. The Framework Agreement on Fixed-term Work of	196
18 March 1999	196
7. The Voluntary Agreement on Telework of 16 July 2002	197
8. Framework Agreement on Work-related Stress of	
8 October 2004	199
9. The Framework Agreement on Harassment and	
Violence at Work (2007)	200
E. The Judgment of the Court of First Instance of	
17 June 1998	202
VI. Evaluation: A Scenario for Social Dumping and a	
Dual Society	203
A. Macroeconomic: Inflation and NAIRU	203
B. Flexibility	204
C. An Evaluation	204
Chapter 4. European Labour Law: Trailer or Locomotive?	206
complete it but opening but a better of better	
\$1 Typ ECCC	204
§1. The ECSC §2. The EC	206 206
I. 1957–1974	200
II. 1974–1989	208
III. 1990 and Beyond: The Community Charter and the	200
Social Action Programme – The Maastricht Agreement	
on Social Policy	210
A. The Community Charter of Basic Social Rights	210
1. Foundation	210
2. Objectives	210
3. Scope	211
4. Content	212
a. The Twelve Commandments	212
b. Implementation	214
B. The Action Programme	214
C. The Maastricht Agreement on Social Policy (1991), the	
Green and the White Papers (1993)	215
IV. The White Paper on Growth, Competitiveness and	
Employment (1993)	217
V. The White Paper on European Social Policy (1994)	219
VI. 1996 and Beyond: Unemployment	221
A. The European Council in Essen (1994)	221
B. The Confidence Pact for Employment (1996)	222
VII. The Treaty of Amsterdam (1997) – Employment	223
A. European Jobs Summit, Luxembourg, November 1997	226
1. Commission's Proposals	226
a. A New Culture of Entrepreneurship in the EU	227
b A New Culture of Employability in the FII	227

c. A New Culture of Adaptability in the EU	228
d. A New Culture of Equal Opportunities in the EU	229
2. Social Partners	229
B. Jobs Summit: Conclusions Luxembourg	230
VIII. The Treaty of Nice (December 2000): 'Socially not so nice'	231
A. Charter of Fundamental Rights of the European Union	
(Nice, 7 December 2000)	231
1. Preamble	231
2. Content; List of Rights	232
3. Scope and Level of Protection	233
a. Scope	233
b. Level of Protection	233
c. Prohibition of Abuse of Rights	233
d. An Evaluation; Binding Effect	233
B. Unanimity and Qualified Majority	236
IX. Employment Guidelines	238
A. The Employment Guidelines 2003–2004	238
B. The Employment Guidelines 2005–2008	242
X. The Modernisation of Labour Law (2006)	250
XI. Flexicurity: More and Better Jobs through Flexibility and	200
Security (2007)	254
§3. Convergence or Divergence?	261
Part I. Individual Labour Law	269
Chapter 1. The Free Movement of Workers	270
Chapter 1. The Free Movement of Workers	270
§1. Equal Treatment	274
I. National Law	274
II. Collective and Individual Agreements	280
III. Work	283
IV. Performance of Work	284
V. Trade Union Freedom, Workers' Participation, Management of	201
Public Bodies	289
VI. Housing	290
VII. Workers' Families	290
VIII. Training of Children	292
§2. Scope of Application	293
I. Workers	293
A. In General	293
B. Sports	297
1. The <i>Mecca</i> Case – the <i>Bosman</i> Case – the <i>Lethonen</i>	271
Case – the Kolpak Case	297
2. The <i>Balog</i> Case: Transfer and Competition Rules	309
3. Agreement between the European Commission, FIFA	507
and UEFA (5 March 2001)	314
	JIT

	a. The Declaration of Nice (December 2000)	314
	b. The Agreement of 5 March 2001 between FIFA and	
	the European Commission	316
	c. Consequences of the New System	317
	d. Incompatible with Fundamental Rights and EC Law	318
	e. Assessment of the New System	319
	f. Proposals	320
	g. Memorandum of Understanding (UEFA-FIFPRO)	
	(2007)	321
	C. Others	323
	II. Family Members	324
	III. Exceptions	327
	A. Employment in the Public Sector	327
	B. Public Policy, Security and Public Health	329
§3.	PROMOTION	330
	I. Employment Services	330
	II. Vocational Training	332
	III. Recognition of Qualifications and Diplomas	339
Ch	apter 2. Freedom of Services	344
§1.	SCOPE OF APPLICATION	344
	I. Service	344
	A. Material	344
	B. Personal	345
	II. For Remuneration	345
	III. Temporary	345
	IV. Trans Border	346
§2.	PROHIBITION OF RESTRICTIONS AND OF DISCRIMINATION	346
	I. Restrictions	346
	II. Discrimination	347
§3.	JUSTIFIED RESTRICTIONS AND UNEQUAL TREATMENT	348
	I. Public Authority, Public Policy, Public Security or	
	Public Health	348
	A. Public Authority	348
	B. Public Policy, Public Security or Public Health	348
	II. Restrictions on the Grounds of the Rule of Reason	349
§4.	PROTECTION OF WORKERS	350
	I. Application of National Legislation and Collective Agreements:	
	Rush Portuguesa Lda	350
	A. Facts	350
	B. The Court of Justice	350
	II. Fine Tuning of the General Rule	351
	A. The <i>Vander Elst</i> Case	352
	1. Facts	352
	2. The Court	353
	B. The Arhlade Case	355

1. Facts	355
2. Legislation and Collective Agreements of the Work Land	356
3. The Court	358
C. The André Mazzoleni Case	360
1. Facts	360
2. Minimum Remuneration	360
3. General Principles	360
D. Finalarte Sociedade de Construção Civil Lda	362
1. Holiday Entitlement for Construction Workers in Germany	362
2. The Main Proceedings and the Questions	364
3. The Answers of the Court	365
E. The <i>Portugaia Construções Lda</i> Case	370
1. Facts	370
2. The Answer of the Court	370
F. Commission v. Federal Republic of Germany	373
G. The European Commission v. Federal Republic of Germany	376
H. The European Commssion v. Spain	378
I. The European Commission v. Austria	379
J. The Viking and the Laval Cases: Freedom of Establishment	
& Services and Industrial Action	379
K. The Rueffert Case	387
L. Commission v. Germany: Documents: Temporary Agencies	388
§5. Bolkestein: The Draft Directive on Services	388
§6. The Directive on Services in the Internal Market (2006)	394
Chapter 3. International Private Labour Law	396
§1. The Competent Judge	396
§2. The Applicable Law to Contractual Obligations	401
§3. THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS:	
Industrial Action	402
§4. Posting of Workers: Directive 96/71 of 16 December 1996	402
I. Legal Base	403
II. Scope of Application	403
III. Terms and Conditions of Employment	404
A. Minimum Conditions	404
B. Other Conditions	405
C. Exceptions	405
IV. Cooperation and Transparency (Article 4)	406
V. Enforcement (Article 5)	406
A. Guarantee	406
B. Translation and Notification	410
C. EU Posting of Workers Certificate and Visa and	
Notification Procedure	411
1. Prevention of Abusive Practices	412
2. Compliance with Pay and Working Conditions	412
3. Regular Workers	412

V	I. Jurisdiction (Article 6)	413
	I. Implementation (Article 7) – Review (Article 8)	413
	I. Commission Guidance on the Posting of Workers in the	
	Framework of the Provision of Services	413
	A. Guidance: Control Measures	413
	1. General Application Measures	413
	2. Measures which Apply to Posted Workers who are	
	Nationals of Third Countries	418
	B. Cooperation on Information	418
	1. Access to Information	418
	2. Cooperation between Member States	419
	C. Monitoring of Compliance with the Directive and	
	Measures in the Event of Failure to Comply	420
Chapte	er 4. Individual Employment Contracts	423
Спари	4. Individual Employment Contracts	423
§1. Tem	MPORARY WORK – PART-TIME – FIXED TERM CONTRACTS	
	ELEWORK	423
I.	Directive: Health and Safety	423
	A. Scope	424
	B. Object: Equal Treatment	424
	C. Provision of Information to Workers	424
	D. Workers' Training	425
	E. Use of Workers' Services and Medical Surveillance of	
	Workers	425
	F. Protection and Prevention Services	425
	G. Temporary Employment: Responsibility	425
	H. Reporting	426
11.	Part-time Work: The Collective Agreement of 6 June 1997	426
	A. Developments	426
	B. Purpose	426
	C. Scope	427
	D. Definitions	427
	E. Principle of Non-discrimination	427
	F. Opportunities for Part-time Work	429
TIT	G. Provisions on Implementation	430
111.	The Agreement on Fixed-term Contracts of 18 March 1999	430
	A. Purpose of the Framework Agreement B. Scope	432
	C. Definitions	432 433
	D. Principle of Non-discrimination	433
	E. Measures to Prevent Abuse	
	F. Information and Employment Opportunities	434 440
	G. Information and Consultation	440
	H. Provisions on Implementation	440
IV	Proposal for a Directive on Working Conditions for Temporary	441
1 7 .	Workers	441

A. Genesis	441
B. The Proposal for a Directive	443
1. The Rationale	443
2. General Provisions	444
a. Scope	444
b. Aim	445
c. Definitions	445
d. Review of Restrictions or Prohibitions	445
3. Employment and Working Conditions	446
a. The Principle of Non-Discrimination	446
b. Access to Permanent Quality Employment	446
c. Representation of Temporary Workers	447
d. Information of Workers' Representatives	447
4. Final Provisions	447
V. Framework Agreement on Telework	451
A. General Considerations	452
B. Definition and Scope	453
C. Voluntary Character	453
D. Employment Conditions	454
E. Data Protection	454
F. Privacy	454
G. Equipment	454
H. Health and Safety	455
I. Organisation of Work	455
J. Training	455
K. Collective Rights Issues	455
L. Implementation and Follow-up	456
§2. Conditions Applicable to the Contract of Employment:	
Information	457
I. Scope	458
II. Obligation to Provide Information	458
A. In General	458
B. Expatriate Employees	460
C. Modifications	460
D. Term and Form of Information	460
III. Defence of Rights	461
IV. Implementation §3. Recruitment and Placement: Monopoly of the Public	461
EMPLOYMENT OFFICE?	461
EMPLOYMENT OFFICE:	461
Chapter 5. Child Care and the Protection of Young People	
at Work	466
§1. CHILD CARE	466
§2. Protection of Young People at Work (Directive 94/33 EC	
of 22 June 1994)	467

I. Introductory Remarks	467
II. Purpose and Scope	468
A. Purpose	468
B. Scope	469
III. Definitions	469
IV. Prohibition of Work by Children	470
V. Cultural or Similar Activities	470
VI. General Obligations on Employers	470
VII. Vulnerability of Young People – Prohibition of Work	471
VIII. Working Time	472
IX. Night Work	473
X. Rest Period	473
XI. Measures. Non-reducing Clause. Final Provisions	474
Chapter 6. Equal Treatment	475
§1. A General Framework for Equal Treatment in Employment	
AND OCCUPATION	477
I. General Provisions	477
A. Purpose	477
B. Definitions and Concepts	478
C. Scope	478
D. Occupational Requirements	479
E. Reasonable Accommodation for Disabled Persons	480
F. Justification of Differences of Treatment on Grounds	
of Age	480
G. Positive Action	482
H. Minimum Requirements	483
II. Remedies and Enforcement	483
A. Defence of Rights	483
B. Burden of Proof	483
C. Victimisation	483
D. Dissemination of Information	484
E. Social Dialogue	484
F. Dialogue with Non-governmental Organisations	484
III. Final Provisions	484
A. Compliance	484
B. Sanctions	484
C. Implementation	485
D. Report	485
§2. Equal Treatment between Persons Irrespective of Racial	
or Ethnic Origin	485
I. General Provisions	486
A. Purpose	486
B. Definitions and Concepts of Discrimination	486
C. Scope	486

	D. Genuine and Determining Occupational Requirements	487
	E. Positive Action	487
	F. Minimum Requirements	487
	II. Remedies and Enforcement	487
	A. Defence of Rights	487
	B. Burden of Proof and Victimisation and Dissemination	
	of Information and Social Dialogue and Dialogue with	
	Non-governmental Organisations	488
	III. Bodies for the Promotion of Equal Treatment	488
	IV. Final Provisions: Compliance and Sanctions and	
	Implementation and Report	488
§3.	EQUAL PAY FOR MEN AND WOMEN	488
	I. In General	488
	II. Man and Woman; Sexual Orientation	489
§4.	DEFINITION	493
	I. Equality of Opportunity or of Outcome	494
	II. Direct and Indirect Discrimination	494
	III. Exceptions	503
	A. Nature of the Activity	503
	B. Protection of Women – Parental Leave	505
	C. Positive Discrimination	507
§5.	Овјест	510
	I. Equal Pay for Equal Work or Work of Equal Value	510
	A. Equal Work or Work of Equal Value	510
	B. Equal Pay	514
	II. Access to Employment, Promotion, Vocational Training	528
	III. Employment and Working Conditions	536
	IV. Social Security, Pensions	550
	V. Freedom of Association	551
	VI. Follow Up of the 1976 Directive. Promotion and Social	
	Dialogue	551
	A. Enforcement	551
	B. Protection of Employees, including Representatives	552
	C. Promotion	552
	D. Social Dialogue	553
	E. Sanctions	553
§6.	Proof	554
	I. Aim	554
	II. Definitions	554
	III. Scope	554
	IV. Burden of Proof	555
	V. Information	555
	VI. Non-regression	556
0.55	VII. Implementation	556
	DIRECT EFFECT	556
\$8.	AGE DIVERSITY GUIDELINES AGREED IN COMMERCE SECTOR	556

§9. Framework Agreement of Actions on Gender Equality	557
§10. Directive 2006/54/EC on the Implementation of the	
PRINCIPLE OF EQUAL OPPORTUNITIES AND EQUAL TREATMENT	
of Men and Women	560
I. Purpose and Definitions	561
A. Purpose	561
B. Definitions	561
II. Equal Pay: Prohibition of Discrimination	562
III. Equal Treatment as Regards Access to Employment,	
Vocational Training and Promotion and Working	
Conditions	562
A. Prohibition of Discrimination	562
B. Return from Maternity Leave	562
C. Paternity and Adoption Leave	563
IV. Remedies and Enforcement	563
A. Defence of Rights	563
B. Compensation or Reparation	563
C. Burden of Proof	564
V. Promotion of Equal Treatment – Dialogue	564
A. Equality Bodies	564
B. Social Dialogue	564
C. Dialogue with Non-governmental Organisations	565
VI. Compliance	565
VII. Victimisation	565
VIII. Penalties	566
viii. I chances	500
Chapter 7. Protection of Motherhood	567
Chapter 7. Protection of Wotherhood	307
Chapter 8. Working Time, Sunday Rest, Night Work and	
Parental Leave	572
§1. Working Time	572
I. In General	572
II. Directive 2003/88/EC of 4 November 2003	573
A. Scope and Definitions	574
1. Purpose and Scope	574
2. Definitions	575
B. Minimum Rest Periods, Other Aspects of the Organisation	
of Working Time	580
1. Daily Rest	580
2. Breaks	581
3. Weekly Rest Period	581
4. Maximum Weekly Working Time	581
5. Annual Leave	581
C. Night Work/Shift Work, Pattern of Work	584

1. Length of Night Work	584
2. Health Assessment and Transfer of Night Workers to	
Day Work	584
3. Guarantees for Night-Time Working	584
4. Notification of Regular Use of Night Workers	584
5. Safety and Health Protection	585
6. Pattern of Work	585
D. Miscellaneous Provisions	585
1. More Specific Community Provisions	585
2. More Favourable Provisions	585
3. Reference Periods	585
E. Derogations and Exceptions	586
1. Derogations	586
2. Derogations by Collective Agreements	588
3. Limitations to Derogations from Reference Periods	589
4. Mobile Workers and Offshore Work	589
5. Workers on Board Seagoing Fishing Vessels	589
6. Miscellaneous Provisions	591
F. Final Provisions	591
1. Level of Protection	591
2. Reports	592
3. Review of the Operation of Provisions with Regard	
to Workers on Board Seagoing Fishing Vessels	592
4. Review of the Operation of Provisions with	
Regard to Workers concerned with the Carriage	
of Passengers	592
5. Entry into Force	592
G. Proposals to amend Directive 2003/88	592
III. Working Time for Seafarers	595
A. Scope	595
B. Definitions	595
C. Hours of Work	595
D. Table	596
E. Seafarers under 18 years	596
F. Distress at Sea	597
G. Records	597
H. Manning Levels	597
I. Persons under 16 years	598
J. Necessary Resources	598
K. Health Certificate	598
L. Watchkeepers and Night Work	598
M. Safety and Health	598
N. Annual Leave	598
IV. Working Time of Mobile Workers in Civil Aviation	599
A. Scope	599
B. Definitions	599

	C. Paid Annual Leave	599
	D. Health Assessment	600
	E. Safety and Health	600
	F. Working Time	600
	G. Days Free	600
	H. Review	601
	I. Implementation	601
	V. Working Time of Mobile Road Transport Workers	601
	A. Purpose	602
	B. Scope	602
	C. Definitions	602
	D. Maximum Weekly Working Time	604
	E. Breaks	604
	F. Rest Periods	605
	G. Night Work	605
	H. Derogations	605
	I. Information and Records	605
	J. Final Provisions	606
	VI. Certain Aspects of the Working Conditions of Mobile	
	Workers Engaged in Interoperable Cross-border Services	
	in the Railway Sector	606
	A. Scope	606
	B. Definitions	606
	C. Daily Rest at Home	607
	D. Daily Rest Away from Home	607
	E. Breaks	607
	F. Weekly Rest Period	608
	G. Driving Time	608
	H. Checks	608
	I. Non-regression Clause	609
	J. Follow-up to the Agreement	609
	K. Evaluation	609
	L. Review	609
	Sunday Rest	609
	NIGHT WORK AND EQUAL TREATMENT	610
§4.	Parental Leave	613
	I. Objectives and Principles	613
	A. Objectives	613
	B. Values	613
	1. Family Life	613
	2. Equal Treatment	614
	C. Subsidiarity and Proportionality	614
	D. Competitiveness – SMEs	614
	II. Scope	615
	III. Content	615
	A. Parental Leave	615